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In The
Supreme Court of the United States

October Term, 1996

OLLIE DAILEY,
Petitioner,

vs.

LTV AEROSPACE AND DEFENSE COMPANY,
Respondent.

Consolidated with

OLLIE DAILEY,
Petitioner,

vs.

VOUGHT AIRCRAFT COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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66 pp

QUESTIONS PRESENTED

The District Court systematically dismissed in *Dailey I*, both with and without prejudice, or refused to allow Petitioner to join, all of his legal claims which were dependent on the same facts as the equitable claims already pending before it, found there was a genuine issue of fact as to his equitable claims, tried them before the court, and then at the same time applied the doctrines of collateral estoppel and res judicata to dismiss the legal claims brought in separate suits before judgment had been rendered in *Dailey I*. The legal claims were all excluded because the District Court had determined the administrative prerequisites necessary to his Title VII and ADA claims had not been exhausted or initiated in a timely manner. Petitioner contends the District Court was in error in its decisions regarding whether Petitioner had exhausted the administrative prerequisites to bringing suit over his legal claims, and that but for this erroneous dismissal of his legal claims, he would have been entitled to a jury trial on all issues common to both his legal and equitable claims because his legal claims were part of a continuing violation spanning the effective date of the Civil Rights Act of 1991. If in fact the District Court was in error in not allowing any of Petitioner's legal claims to be joined with his equitable claims, then according to this Court's holding in *Lytle v. Household Mfg., Inc.*[1], he has been deprived of his constitutional right to a jury trial and the only remedy is to reverse and remand both his equitable and legal claims for a jury trial on all common issues. Whether the District Court was in error in its determination that Petitioner had failed to meet the administrative prerequisites to bringing his legal claims, or in later finding Petitioner and his counsel had brought duplicative or frivilous claims in *Dailey II* and *Dailey III*, depends on this Court's answers to the following:

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1 110 S.Ct. 1331 (1990).

Question No. 1: Must a plaintiff return to the EEOC to complain about each act of retaliation in a continuing violation of alleged race discrimination and retaliation before it can be said he has met the administrative prerequisites necessary to join subsequent acts of discriminaton and retaliation with those identical or similar charges already pending before the court?

Question No. 2: Is the timely filing of a claim of discrimination with another federal agency other then the EEOC sufficient filing in place of a filing with the EEOC, when the other agency had concurrent jurisdiction over the employer involved, the charge is based on the same allegations, and the only reason the claim was not referred to the EEOC was because of the federal agency's bureaucratic ineptitude?

Question No. 3: Must a plaintiff continue attempts at conciliation well after 180 days have passed since the filing of his EEOC charge, a right to sue letter has been received, and prior conciliation efforts by a federal agency acting as the EEOC's agency have been unsuccessful, before it can be said he has exhausted the administrative prerequisites to coming before the court?

Question No. 4: If a plaintiff is able to timely cure any alleged failures to exhaust the administrative prerequisites after dismissal from suit, may they be brought in a subsequent suit prior to judgment being rendered in the first without the doctrines of res judicata and collateral estoppel being applied to the subsequent suits in which the plaintiff brought the claims only after trying to join them in the first suit, being denied due to nearness to trial, and when the opposing party did not file a plea of another cause pending or move to consolidate the cases when they were brought in the subsequent suits?

Question No. 5: When the only reason the District Court was able to try a plaintiff's equitable claims before his legal claims with common issues, was due solely to the District Court's erroneous dismissal of the plaintiff's legal claims, has the plaintiff been deprived of his constitutional right to a jury trial on all common issues?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Ollie Dailey, respectfully petitions for a writ of certiorari to review the judgment the Fifth Circuit Court of Appeals entered on March 13, 1996, and the subsequent denial of his Suggestion for Rehearing En Banc, treated as a

Petition for Rehearing, on June 14, 1996 both of which affirmed the District Court's decisions listed below.

OPINIONS BELOW

On November 4, 1993 the District Court entered an Order in *Dailey I* denying Petitioner's Motion for Leave to Amend and striking Petitioner's Final Supplemental Complaint in which he alleged his 1993 layoff was another act of race discrimination and retaliation in the course of a continuing violation encompassed in the charge already before the court in which Petitioner alleged that his employer had been refusing to allow him to return to work since October, 1990 because of his race and in retaliation for his having engaged in protected activities. (App., *infra*, 1a).

On November 9, 1993 the District Court issued a Memorandum Order & Opinion in *Dailey I* dismissing without prejudice Petitioner's ADA claim arising out of an October, 1992 refusal to return him to work so that additional attempts at conciliation could take place. (App., *infra*, 2a-10a).

On December 14, 1993 the District Court issued a Memorandum Order & Opinion in *Dailey I* denying Petitioner's Second Motion for Leave to Amend to include his race discrimination and retaliation claims arising out of his 1993 layoff and stated that those claims would have to be brought in a separate suit due to nearness to trial. (App., *infra*, 11a-12a).

On December 17, 1993 the District Court issued a Memorandum Order & Opinion in *Dailey I* removing Petitioner's case from the jury docket as not being subject to the Civil Rights Act of 1991 because there were no post '91 Act claims pending before it. (App., *infra*, 13a-15a).

Also on December 17, 1993 the District Court issued a Memorandum Order & Opinion in *Dailey I* denying Petitioner's Motion to Reconsider its November 9, 1993

Memorandum Order & Opinion dismissing his ADA claims over the October, 1992 refusal to return him to work. (App., *infra*, 16a-19a).

On January 6, 1995 the District Court entered its Findings of Fact and Conclusions of Law and Judgment in *Dailey I* finding no race discrimination or retaliation as a result of the initial claim that Petitioner's employer had been refusing to allow him to return to work since October, 1990.

On January 18, 1995 the District Court entered its Memorandum Order & Opinion in *Dailey I* denying Petitioner's Motion for Reconsideration of the Findings of Fact and Conclusions of Law and Judgment entered on January 6, 1995. (App., *infra*, 20a).

Also on January 6, 1995 the District Court entered an Order in *Dailey II* dismissing the 1993 layoff claims which had been brought in a separate suit in accordance with the District Court's December 14, 1993 ruling in *Dailey I* on the grounds that these claims were no different from those brought in *Dailey I*. (App., *infra*, 21a-22a).

Also on January 6, 1995 the District Court in *Dailey III* dismissed Petitioner's claims of race discrimination and retaliation under Title VII and 42 U.S.C. Sec. 1981 arising out of the refusal to return him to work in October, 1992 on the basis that these claims were the same brought in *Dailey I* or could have been brought in *Dailey I*. (App., *infra*, 23a-25a).

Also on January 6, 1995 the District Court in *Dailey II* and *Dailey III* entered an order imposing sanctions against Petitioner and his counsel for having brought frivolous and duplicative claims by bringing in *Dailey II* and *Dailey III* his Title VII and 42 U.S.C. Sec. 1981 claims arising out of the October, 1992 refusal to return him to work and the July, 1993 layoff on the basis that these claims had been brought in *Dailey I*. (App., *infra*, 26a-29a).

On April 12, 1995 final judgment was entered in *Dailey II* and *Dailey III* with the exception of Petitioner's October,

1992 ADA claim which was severed and remained with the District Court for later disposition. (App., *infra*, 30a).

STATEMENT OF JURISDICTION

The Fifth Circuit Court of Appeals affirmed the District Court's decisions on March 13, 1996. (App., *infra*, 31a-35a). It denied Petitioner's Suggestion for Rehearing En Banc which was treated like a Petition for Rehearing on June 14, 1996 without decision. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257.

CONSTITUTIONAL PROVISIONS

Seventh Amendment to the United States Constitution:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Prior to bringing suit Petitioner had been actively participating in the picketing of his employer together with his co-workers over alleged systemic race discrimination. Although a class action complaint filed with the Department of Labor was able to find 11 individuals who had been discriminated against in promotions, there was no finding of systemic discrimination ultimately made. Petitioner was also active in union politics and campaigned for a union position. While doing so, his campaign literature was defaced with the word "Nigger." Petitioner took this problem to the Superintendent of his Department, Mr. Gerald Skinner.

While they were discussing this problem, Mr. Skinner without explanation voluntarily informed Petitioner that he did not believe in mixed marriages, that he would never allow his daughter to marry a black man, and that if the whites and blacks kept marrying each other pretty soon they would all be a bunch of Mexicans. As a result of his admission to having made these statements, Mr. Skinner was suspended for three days. Three weeks later, Petitioner came to work as he had always done for the previous 6 years, but for the first time could not locate his big red mechanic's tool box. Eventually he was able to find it where it had been pushed up against the wall and covered over with trash. Having been prodded and out of frustration, Petitioner yelled out to no one in particular "someone better tell these ----ing white boys to leave my stuff alone." Petitioner was immediately suspended after being told his giving a statement about what had happened would not change their mind. When he returned to work, Petitioner was told that his employer no longer had any work for him within the 20 pound lifting restrictions he had as a result of an on the job injury occurring in January, 1990. Petitioner could do his job regardless of the weight involved as long as he was assigned to one of 20-25 machines which had working hoists, and was not assigned to one of the five machines without working hoists whenever the assignment involved lifting something over 20 pounds or required he stoop or bend.

Petitioner timely filed an EEOC charge of race discrimination and retaliation under Title VII alleging that his employer was using his disability as a pretext for keeping him off work when he was in fact capable of working whether his employer had work within his lifting restrictions or not. Petitioner believed he was being kept off work because of his race and in retaliation for his having engaged in protected activities, including, most recently complaining about his Superintendent's racist comments during his consideration of Petitioner's complaints about his campaign literature having been defaced with the word "Nigger."

Upon receiving his right to sue letter, Petitioner originally brought suit against his employer on December 20, 1991 when he filed his First Amended Complaint and Jury Demand in *Dailey I* (Civil Action No. 3:91-CV-1327-X) joining the employer as a party. Petitioner alleged in *Dailey I* that his employer had discriminated against him because of his race and that it retaliated against him for having engaged in protected activities when on October 16, 1990 he was suspended and then on October 22, 1990 not allowed to return to work allegedly because his disability prohibited him from being able to do his job when in fact he could do his job with minor accommodation. On March 9, 1993 Petitioner filed with leave of court his Second Amended Complaint and Jury Demand joining additional claims of race discrimination and retaliation, as well as, disability discrimination under the ADA over a second refusal to return him to work occurring on October 6, 1992[1]. On May 28, 1993 Petitioner filed his Final Supplemental Complaint without leave of the court to join additional claims of race discrimination, disability discrimination, and retaliation over his having been notified during a multiple-day video taped deposition he would be laid off effective July, 1993. Said notification was given within days of the Department of Labor having notified him that it had determined his employer could accommodate him and that it had to return him to work. The decision to lay off Petitioner was made by Mr. Skinner on May 20, 1993, the same day Petitioner's employer had met with the Department of Labor, been told they had no right to appeal its decision, would have to return Petitioner to work, and were invited to attempt conciliation. It has been Petitioner's claim that the layoff itself was specifically motivated to avoid having to put

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1 Petitioner had been informed that a white machinist with a disability restricting the amount of weight that could be lifted had been offered a position, and again made an effort to return to work, but was refused again.

him back to work, and that but for that motivation he nor any of the employees laid off at that time would have been laid off at that time. On June17, 1993 Petitioner filed his Motion for Leave to File the Final Supplemental Complaint he had previously filed without leave of the District Court.

On September 7, 1993 the District Court dismissed Petitioners claims in so far as they sought relief under the Civil Rights Act of 1991 (hereinafter the "91 Act"). On November 4, 1993 the District Court denied Petitioner's Motion for Leave to File his Final Supplemental Complaint over his 1993 layoff and struck the Final Supplemental Complaint on the basis that the claims made therein were too remote in time and substance from those informing his complaint and that they had never been submitted to the EEOC. (App., *infra*, 1a). Petitioner argued under these facts the claim was not too remote, and that as a repeat of the same retaliatory act, i.e., refusal to return him to work, already pending before the District Court, he need not return to the EEOC before bringing his claim in court. On November 9, 1993 the District Court dismissed without prejudice Petitioner's ADA claims arising out of the October, 1992 refusal to return him to work on the basis that his employer was attempting conciliation with the Department of Labor on claims arising out of the same incident under the Rehabilitation Act of 1973. (App., *infra*, 2a-10a). In the same order the District Court determined there was a genuine issue of fact under Title VII as to why Petitioner had been kept off work beginning October, 1990. On November 16, 1993 Petitioner filed a Motion for Reconsideration of its decision to dismiss the October, 1992 ADA claims arguing his employer had no right to further conciliation efforts in that the Department of Labor had been unsuccessful in conciliating the ADA claims after several months and had deferred the claim to his lawsuit since the EEOC had already issued a right to sue letter. On December 6, 1993, having timely gone back to the EEOC to cure any alleged administrative defect

surrounding his 1993 layoff, Petitioner filed his Second Motion for Leave to File Plaintiff's Final Supplemental Complaint. On December 14, 1993 the District Court ruling on Petitioner's Second Motion for Leave to File his Final Supplemental Complaint held that it was too late to interject the July, 1993 layoff claims and that they would have to be brought in a separate suit. (App., *infra*, 11a-12a). On December 17, 1993 the trial court, ruling on Petitioner's November 16, 1993 Motion for Reconsideration of its decision to dismiss the October, 1992 ADA claims for further conciliation, denied the Motion for Reconsideration stating still further efforts at conciliation with the EEOC were required. (App., *infra*, 16a-19a). The District Court reasoned that it was too late to interject a new claim in a case a month from trial and that since the EEOC was willing to conduct further conciliation efforts over this issue, he was denying the Motion for Reconsideration of his dismissal of the October, 1992 ADA claims. Also on December 17, 1993 the District Court removed *Dailey I* from the jury docket finding that there were no post '91 Act claims supported by an EEOC charge before it, and that since Petitioner had failed to file an EEOC charge alleging race discrimination and retaliation over the October, 1992 refusal to return him to work when he had filed his ADA charge over the same incident, that incident could not serve as the basis for a post '91 Act Title VII claim either. (App., *infra*, 13a-15a). Petitioner argued that as a repeat of the same act of retaliation, i.e., refusal to return him to work, he need not return to the EEOC before bringing this claim. Petitioner also argued that he had filed this claim at the time of the incident with the Department of Labor which had failed to refer it to the EEOC as it was required to do when claims of both disability discrimination and race discrimination are filed with it.

Dailey I went to trial January 4 through January 7, 1994. Prior to trial the District Court had determined it would only allow 2 days for trial. After hearing some testimony, the

District Court decided the parties could take the time needed to try the case. During trial the District Court attempted to get the parties to settle and in the process the District Court warned Petitioner not to be "greedy" and instructed him that it was better to settle a case then face years of appeals. A $100,000.00 offer was made which Petitioner turned down.

On February 18, 1994 Petitioner filed *Dailey II* (Civil Action No. 3:94-CV-325) bringing in it his race discrimination and retaliation claims arising out of the July 1993 layoff which the District Court had specifically said he would have to bring in a separate suit from *Dailey I*. Petitioner alleged he was laid off in continued furtherance of its discriminatory refusal to return him to work after being ordered to do so by the Department of Labor and to cut off the lost wages his employer was being made to pay by the Department of Labor. Petitioner again alleged this was simply another incident of his employer's refusal to allow him to return to work because of his race and his having engaged in protected activities.

After Petitioner had returned to the EEOC as ordered by the District Court in *Dailey I* on his October, 1992 ADA claims for further conciliation he amended his EEOC charge which had been reopened by the EEOC to include claims of race discrimination and retaliation under Title VII over the same incident. When the additional conciliation was unsuccessful and a right to sue letter was received over the October, 1992 incident, Petitioner moved to amend his complaint on April 28, 1994 in *Dailey II* to include his ADA and Title VII claims over this incident, as well as, a claim under 42 U.S.C. Sec. 1981 over the same incident. Concerned about the 90 day limitations period, Petitioner withdrew this Motion to Amend when it was not ruled upon by the court in *Dailey II* and filed a third suit, *Dailey III* (Civil Action No. 3:94-CV-1214) on June 13, 1994 including his Title VII and ADA, as well as, 42 U.S.C. Sec. 1981 claims over the October, 1992 refusal to return him to work. *Dailey*

II and *Dailey III* were transferred to the Judge handling *Dailey I* and were later consolidated.

A year after trial in *Dailey I*, on January 6, 1995, the District Court rendered its Findings of Fact and Conclusions of Law and Judgment holding that the employer's refusal to allow him to return to work in October, 1990 was not motivated by race discrimination or retaliation for his having engaged in protected activities. Petitioner filed a Motion for Reconsideration on January 17, 1995 which was denied on January 18, 1995. On February 16, 1995 Dailey filed his Notice of Appeal over the various decisions made in *Dailey I*.

Also on January 6, 1995 the District Court in *Dailey II* simultaneously dismissed Petitioner's claims that he had been laid off in July, 1993, due to his race and in retaliation for his having engaged in protected activities on the basis that they had already been litigated in *Dailey I* and were duplicative. (App., *infra*, 21a-22a). Contrary to the District Court's statement, it had not litigated this claim in *Dailey I*, but had specifically told Petitioner to bring it in another suit. Additionally, on January 6, 1995 the District Court dismissed Petitioner's Title VII and 42 U.S.C. Sec. 1981 claims over the October, 1992 incident on in *Dailey III* on the grounds that the Title VII claim had already been decided in *Dailey I* as not having been filed with the EEOC in time and on the grounds that the 42 U.S.C. Sec. 1981 claims could have been brought in *Dailey I*. (App., infra, 23a-25a). The District Court failed to recognize that by forcing the ADA charge over the October 1992 incident to be reopened by the EEOC it had opened the door for Petitioner to timely amend his charge to include the Title VII claim. As such something had occured since the District Court had determined in *Dailey I* that it was too late for Petitioner to file a charge of race discrimination with the EEOC over the October, 1992 incident which changed that fact. Also on January 6, 1995 the District Court found Petitioner and his counsel jointly and severally liable for sanctions in *Dialey II* and *Dailey III* for bringing his Title VII

and 42 U.S.C. Sec. 1981 claims over the October, 1992 refusal to return him to work and for bringing his Title VII claims over the July, 1993 layoff finding these claims had been specifically and thoroughly litigated before the court in January, 1994 and dismissed in his December 17, 1993 Order. (App., *infra*, 26a-29a). As such it was determined Petitioner was barred from bringing these claims under the doctrines of res judicata and collateral estoppel. On January 18, 1995 the District Court denied Petitioner's Motion for Reconsideration of its decisions in *Dailey II* and *Dailey III*.

On April 12, 1995 the District Court severed Petitioner's Title VII and 42 U.S.C. Sec. 1981 claims over the October 1992 and July 1993 incidents in *Dailey II* and *Dailey III* from his ADA claims over the October, 1992 incident and entered final judgment on the race discrimination and retaliation claims. (App., *infra*, 30a).

Petitioner timely gave notice of appeal in *Dailey I* and the consolidated *Dailey II* and *Dailey III* case. On July 10, 1995 the Fifth Circuit Court of Appeals consolidated these two appeals. Petitioner argued on appeal that the District Court had erroneously dismissed or not allowed him to join several post '91 Act claims and that in doing so he had been deprived of his right to a jury trial on his pre '91 Act claims involving common issues. On March 13 1996 the Court of Appeals affirmed the District Court's decisions in all respects in its own summary decision. (App., *infra*, 31a-35a). In its decision the Court of Appeals found that "through piecemeal filings with the Equal Employment Opportunity Commission ("EEOC") over a period of several years on some charges, and failure to file with the appropriate administrative agency on others, [Petitioner] created a legal and procedural morass for the trial court." It further stated, that "the district court maneuvered through that morass with precision", and then affirmed in all respects the judgments and rulings of the district court that were the subject of appeal. The Court of Appeals failed to discuss a single point of error argued on

appeal and cited no law, let alone anything contrary to the law cited by Petitioner in support of his legal arguments.

Petitioner acknowledges that this case is a procedural morass as stated by the Court of Appeals, but he disputes its determination that he is the cause of the morass. Petitioner merely followed the law as set out by the Court of Appeals as regards the administrative prerequisites which must be met before he could bring his additional claims of retaliation arising out of the same circumstances as those already pending before the District Court. If his claims were "piecemeal" it was only because all of the incidents of which Petitioner complains did not occur at the same time, but at different intervals during the course of the litigation in *Dailey I*, and because of the improper and unnecessary administrative procedures the District Court required he go through in order to bring his claims in court. The District Court and the Court of Appeals have repeatedly painted Petitioner and his counsel in a poor light unfairly attributing an evil motive to almost every action taken during the course of the litigation involved. There is nothing in the record which would even come close to supporting a claim that Petitioner and his counsel did anything without a legitimate argument based in the law or in bad faith. To the contrary, Petitioner has attempted to manuever through a maze of administrative and judicial requirements by the District Court on claims that were clearly meritorious claims. Petitioner questions why it is he who is turned into the villain in this case when it is his employer who allowed his campaign literature to be defaced with the word "Nigger", when it is the Superintendent of his department who doesn't know when to keep his personal beliefs that blacks and whites should not mix to himself, when it is his employer who has been found to have discriminated against other blacks, and when it is his employer who was found by the Department of Labor to in fact be able to accommodate his lifting restrictions without any problem. Petitioner and his counsel have quite simply been mistreated by the District

Court and the Fifth Circuit Court of Appeals has allowed this to occur.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE BURDEN NECESSARY TO MEET THE ADMINISTRATIVE PREREQUISITES TO BRINGING SUIT OVER SUBSEQUENT INCIDENTS OF DISCRIMINATION AND RETALIATION IDENTICAL OR SIMILAR IN NATURE OR FACTS TO THOSE ALREADY PROPERLY PENDING BEFORE THE DISTRICT COURT IN A CONTINUING VIOLATION CLAIM; AN ISSUE THIS COURT HAS NOT ADDRESSED TO DATE.

Petitioner would contend this Court's resolution of the federal questions presented herein is pertinent and relevant to many cases other then just his. The Court's decisions on the questions presented would aid the lower courts in uniformly administering cases such as the instant one where there is already pending before the District Court a claim of a continuing violation of race discrimination and retaliation, and subsequent instances of the exact same retaliatory act, in this case, the refusal to return Petitioner to work, occur during the pendency of the litigation. The Court's consideration of the questions presented in this writ will prevent the sort of "procedural morass" which the Fifth Circuit Court of Appeals has unfairly laid at the hands of Petitioner in the instant case, but which was actually caused by the District Court requiring Petitioner to return to the EEOC every time his employer again retaliated against him by its repeated refusal to return him to work, even after being ordered to do so by the Department of Labor.

In the instant case, Petitioner had already brought in *Dailey I* a claim of race discrimination and retaliation over his employer's refusal to return him to work in October, 1990. While this suit was pending, Petitioner again attempted to return to work in October, 1992 when he learned a disabled white man had been offered a job in his department, and was again refused. When he was not allowed to return he filed a complaint under the ADA with the EEOC and a complaint alleging disability discrimination, race discrimination, and retaliation with the Department of Labor. Under these circumstances the Department of Labor was suppose to refer Petitioner's claim in its entirety to the EEOC; however, it did not do this. 29 C.F.R. Part 1641.5(e). Instead it investigated the disability claim eventually finding discrimination and sat on the race discrimination and retaliation claims. The EEOC in its own turn eventually issued a right to sue letter on the ADA part of the charge.

When Petitioner received his right to sue letter on the ADA claim he obtained leave of the District Court to amend his complaint in *Dailey I* which he did in March, 1993, to include a claim of race discrimination and retaliation under Title VII and of disability discrimination under the ADA over the October, 1992 refusal to return him to work. He argued there was a continuing violation spanning the '91 Act and that as such he was entitled to a jury trial on all common issues. Petitioner did not return to the EEOC to file another complaint of race discrimination because he already had the same exact claim arising out of the October, 1990 refusal to return him to work pending before the District Court, and the Fifth Circuit Court of Appeals had held that a claim of retaliation growing out of a charge already before the court could be pursued without exhausting administrative prerequisites to filing because the District Court has ancillary jurisdiction over the retaliation claims. Gupta v. East Texas State University, 654 F.2d 411, 413-14 (5th Cir. 1981), citing, Pettway v. American Cast Iron Pipe, Co., 411 F.2d

998, rehearing and rehearing en banc denied, 415 F.2d 1376 (5th Cir. 1969). This legal conclusion was again reached in Gottlieb v. Tulane University of Louisiana, 809 F.2d 278, 283 (5th Cir. 1987), see also, Silver v. Mohasco Corp., 602 F.2d 1083, 1090 (2nd Cir. 1979) and Steffen v. Meridian Life Ins., Co., 859 F.2d 534, 544 (7th Cir. 1988). Petitioner was simply arguing that his employer had again retaliated against him by again refusing to return him to work. There was no need for him to return to the EEOC under these circumstances.

The District Court later on November 9, 1993 dismissed without prejudice Petitioner's ADA claim over the October, 1992 incident on the basis that the Department of Labor was attempting conciliation of the same issue under the Rehabilitation Act of 1973. Petitioner argued that the employer had no right to further conciliation and that this claim should not be dismissed since it was already well beyond 180 days since he had filed his EEOC charge, he had already received a right to sue letter from the EEOC, and the Department of Labor had been attempting to conciliate this issue without success since it first determined his employer had been discriminating against him back in May, 1993, some six months before. When the Department of Labor issued a letter stating that it had been unable to conciliate the ADA aspect of the claim and was deferring it to *Dailey I* since the EEOC had already issued a right to sue letter, Petitioner again attempted to join the issue in *Dailey I*, but was told that still further conciliation was required with the EEOC. Petitioner has argued that while Title VII and the ADA encourage conciliation, it is not a right of a defendant. Gamble v. Birmingham S. R. Co., 514 F.2d 678, 688-9 (5th Cir. 1975). Additionally, if conciliation between the EEOC or its agent, the Department of Labor, and an employer fails, or if 180 days pass without the Commission entering into a conciliation agreement, the Commission must notify the charging party of the failure of conciliation and his right to bring suit. 42

U.S.C. Sec. 2000e-5(f)(1). By the time the District Court had initially dismissed the October, 1992 ADA claim from *Dailey I* in November, 1993, and denied Petitioner's Motion for Reconsideration in December, 1993, it was well over 180 days since Petitioner had filed his charge, and conciliation efforts had been going on for six months without success. Petitioner had already done everything which was required of him in order to invoke the District Court's jurisdiction. He had timely filed a charge, he had cooperated with the investigation, he had attempted conciliation with the Department of Labor acting as the EEOC's agent, and he had received a right to sue letter from the EEOC, as well as, the Department of Labor. 29 C.F.R. Sec. 1641.5(a); 41 C.F.R. Sec. 60-742.5(a). The District Court had, therefore, erroneously dismissed this claim even though it was dismissed without prejudice.

When the District Court determined in December, 1993 that Petitioner could not rely on the October, 1992 incident as a post '91 Act claim of race discrimination and retaliation it did so on the ground that Petitioner had failed to file a timely EEOC charge and that it was too late to do so. Petitioner argued that he need not return to the EEOC to file another charge alleging a repeat of the same retaliatory act already pending before the District Court. Gupta, supra. Thus, the District Court was in error when it dismissed Petitioner's claim that he had been racially discriminated against and retaliated against as a result of the October, 1992 refusal to return him to work. Being unsuccessful with this argument, Petitioner had the EEOC amend his charge to include a Title VII claim over the October, 1992 incident when it reopened his ADA charge over the same incident in accordance with the District Court's order requiring further conciliation. Petitioner had the Department of Labor refer the race discrimination and retaliation claim still pending before it, and which it had been sitting on, to the EEOC which then amended the charge to include his claim of race discrimination

and retaliation over the same incident. District Courts can hear claims arising from untimely charges if those claims "relate back" to allegations made in an earlier, timely charge. 29 C.F.R. Sec. 1601.12(b); Hicks v. ABT Associates, Inc., 572 F.2d 960, 966 (3rd Cir. 1978); Sanchez v. Standard Brands, Inc., 431 F.2d 455, 464 (5th Cir. 1970). When the District Court opened the door by ordering the ADA charge over the October, 1992 incident return to the EEOC for further conciliation, Petitioner had every right to amend his EEOC charge to include a claim of race discrimination and retaliation arising out of the same incident. Such charge would relate back to the original charge. Thus, even though the District Court may have conceivably been correct when it said in *Dailey I* that it was too late to file an EEOC charge alleging Title VII had been violated over the October, 1992 incident, by requiring the EEOC to reopen the ADA charge over the same incident, it had created a situation where it was no longer too late to file this charge.

The District Court's dismissal of Petitioner's July, 1993 layoff claims of race discrimination and retaliation was also erroneous since there was again no need for him to return to the EEOC to complain yet again that his employer was refusing to return him to work. Gupta, supra. Petitioner already had a claim of race discrimination and retaliation based in the employer's failure to return him to work pending before the District Court. This was simply an alleged repeat of the same exact act in a slightly different form. The District Court had concluded in *Dailey I* that the layoff was too remote from the charges pending before it. Petitioner would point out that this claim was identical to the one pending before the District Court, i.e., his employer would not let him return to work. Additionally, the decision to lay Petitioner off was made by the same person whom he had had suspended for making racist comments while addressing a complaint that his campaign literature was being defaced with the word "Nigger", and the decision was being made at the same time

the Department of Labor had informed the employer that it had no choice and had to return Petitioner back to work. It is clear there was at the very least a genuine question as to whether there was a causal connection between the layoff and the employer's initial decision not to allow Petitioner to return to work in October, 1990. Finally, Petitioner fails to see how it can be argued this claim was too remote from the charges pending before it when those charges were still pending before it when the layoff decision was made. It might be a different matter if the original claim had been dead for three years, but it had not been. When the District Court would not reconsider its position, Petitioner returned to the EEOC, it still being within 180 days of the discriminatory and retaliatory layoff, and filed a charge of discrimination and retaliation under Title VII. When he obtained his right to sue letter, Petitioner again returned to the District Court in *Dailey I* and sought leave to amend, but was denied specifically due to the fact the case was ready for trial. The District Court was in error in denying Petitioner the right to join these claims in *Dailey I* as they were not too remote from the charges then pending before it and even if he was required to file with the EEOC first, he had timely done so.

Since the District Court specifically told Petitioner that if he wanted to bring his claims over the July, 1993 layoff he would have to bring a separate suit, he did so and filed *Dailey II*. Petitioner contends such language by the District Court was equivalent to having dismissed the claim without prejudice.

By the time Petitioner had completed the additional conciliation efforts with the EEOC required by the District Court on the ADA October, 1992 claim, *Dailey I* had already gone to trial. Since the ADA claims had been dismissed without prejudice and his charge had been amended to include a claim of race discrimination and retaliation under Title VII while at the EEOC, Petitioner attempted to amend *Dailey II* to bring these claims. Out of misguided concern that the 90

days limitation period would become a problem if the claim were not actually filed within that period of time, Petitioner withdrew his Motion to Amend in *Dailey II* and filed his Title VII and ADA claims over the October, 1992 incident in *Dailey III*.

The District Court later dismissed from *Dailey II* and *Dailey III* all but Petitioner's ADA claims over the October, 1992 incident finding that it had already decided all other claims in *Dailey I* and that they were barred by the doctrines of res judicata and collateral estoppel. The District Court had not decided these issues; however, in *Dailey I*. The District Court had specifically declined to consider the October, 1992 Title VII claim in *Dailey I* because Petitioner had failed to file a charge with the EEOC. However, that charge was able to be amended when the EEOC reopened the ADA charge over the same incident for further conciliation as ordered by the District Court. Although the District Court had previously ruled it was too late for Petitioner to file a Title VII charge with the EEOC over this incident in *Dailey I*, its own act of forcing the EEOC to reopen the ADA charge over the same incident, opened the door for Petitioner to timely amend his charge to include the Title VII allegations. It was, therefore, not too late for Petitioner to amend his charge and bring this claim which was in fact not considered by the District Court in *Dailey I* because the District Court erroneously believed an EEOC charge had to be filed first. As for the Title VII claim over the July, 1993 layoff, that charge also was not finally resolved by the District Court in *Dailey I*. After Petitioner had returned to the EEOC to timely file his charge over this incident, he received his right to sue letter and returned to the District Court in *Dailey I* and again attempted to join the issue only to be told that it was too late because the case was ready for trial and that it would have to be brought in another suit. This issue was neither decided by the District Court in *Dailey I* nor was it dismissed with prejudice under these facts.

Petitioner had also brought a claim under 42 U.S.C. Sec. 1981 over the October 1992 refusal to return him to work in *Dailey III*. This was done in *Dailey III* rather then in *Dailey I* since the District Court had already refused to allow him to bring his Title VII claims over the same incident in *Dailey I* and had forced Petitioner to bring his claims in a separate suit. Since Petitioner was bringing his Title VII claims over the October 1992 incident in *Dailey III*, he decided to bring his 42 U.S.C. Sec. 1981 claims over the same incident in *Dailey III* as well. There was no point in splitting his two claims over the same incident between two suits. The District Court considered it frivolous of Petitioner and his counsel to bring the 42 U.S.C. Sec. 1981 claim in *Dailey III* when it could have been brought in *Dailey I*. Petitioner would contend; however, that since the District Court was requiring he bring his Title VII claims in a separate suit, he had the option of bringing the 42 U.S.C. Sec. 1981 claim in either suit, and it was not frivolous of him to bring it in the only suit the District Court had allowed his Title VII claims over the same incident to be brought in.

Because the District Court had erroneously concluded that all of Petitioner's race discrimination and retaliation claims brought in *Dailey II* and *Dailey III* had already been decided in *Dailey I*, it concluded that the claims were duplicative and frivolous and dismissed them from *Dailey II* and *Dailey III* and then sanctioned Petitioner and his counsel for bringing them. Said sanctions were improper because the claims brought in *Dailey II* and *Dailey III* were not duplicative and had not been decided by the District Court in *Dailey I*. The only thing that had been decided in *Dailey I* were the disputed issues as related to the employer's initial refusal to return him to work in October, 1990, although the claim in *Dailey I* did in fact raise common issues with those claims raised in *Dailey II* and *Dailey III*. In so doing the District Court incorrectly applied its findings of fact in *Dailey I* to the legal claims which the District Court had erroneously

separated out of *Dailey I*, both with and without prejudice, and which were then properly brought in separate suits. It was only the District Court's erroneous dismissal of all of Petitioner's legal claims, or post '91 Act claims, which enabled the District Court to resolve issues common to both his equitable, or pre '91 Act claims, and his post '91 Act claims; issues that would have otherwise been resolved by a jury. This Court has clearly stated that in cases such as this where the District Court erroneously tries equitable claims before legal claims raising common issues, collateral estoppel effect will not be accorded to the District Court's factual findings, but instead, each case in its entirety must be reversed and remanded for a trial before a jury. Lytle v. Household Mfg., Inc., 110 S.Ct. 1331, 1336-1337 (1990). But for the District Court's erroneous dismissal of all of his legal claims on the grounds that he had failed to meet the administrative prerequisites to bringing suit, Petitioner would have been entitled to a jury trial on all issues tried in *Dailey I* since those issues were the same as those on which his legal claims were based. Likewise, but for the District Court's erroneous application of the doctrines of collateral estoppel and res judicata to Petitioner's legal claims, he would not have been subjected to sanctions and he would have been entitled to a jury trial on those claims.

II.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE FIFTH CIRCUIT COURT OF APPEALS HAS DECIDED FEDERAL QUESTIONS IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, AS WELL AS ITS OWN, AND SUCH ACTION CALLS FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Petitioner contends as previously explained that the District Court has methodically, and contrary to Fifth Circuit law, eliminated each and every one of Petitioner's legal claims in order to deprive him of a jury trial on his clearly meritorious claims of race discrimination and retaliation against his employer, and then deprived him of his right to a jury trial by according collateral estoppel and res judicata effect to its decisions and findings of fact on the equitable claims to Petitioner's legal claims. This Court has clearly stated this may not occur. The Fifth Circuit Court of Appeals has therefore by affirming the District Court's decisions, decided a federal question in a way that conflicts with the decisions of this Court, as well as, its own decisions since it has clearly stated a plaintiff need not return to the EEOC on claims of retaliation related to or arising out of the charges already pending before the court. Such acts call for an exercise of this Court's power of supervision.

III.

THIS COURT SHOULD GRANT CERTIORARI ON THE QUESTIONS PRESENTED BECAUSE THEY ARE IMPORTANT.

The District Court has been allowed to deprive Petitioner of his right to a jury trial on every one of his post '91 Act claims and in the process been allowed to unfairly blame Petitioner for the procedural complications in this case. It is not Petitioner who has created the procedural complications in this case. Petitioner originally brought all of his claims in one case in a timely fashion and filed with the EEOC when the law required he do so, and did not file when the law did not require he do so. The District Court then forced Petitioner to take additional administrative prerequisites which he should not have been required to take and which served no purpose but to create the procedural mess

Petitioner is now accused of creating. Petitioner would contend that the District Court's actions were taken with the specific intent of depriving him of his constitutional right to a jury trial on his legal claims and all issues common to those claims and his equitable claims. This Court's denial of this writ will be the same as this Court's support of the District Court's and the Court of Appeal's deprivation of Petitioner's constitutional right to a jury trial since this Court has held that it would be anomalous to hold that a District Court can deprive a litigant of his right to a jury trial by deciding an equitable claim before a jury hears a legal claim dependent on common issues, but that a District Court may accomplish the same result by erroneously dismissing the legal claim. Lytle, supra. This Court has determined this would be unfair because the litigant is required to join his legal and equitable claims in order to avoid the doctrines of res judicata and collateral estoppel. Id. The District Court has done exactly this. By erroneously dismissing or not allowing to be joined all of Petitioner's legal claims, it has managed to deprive him of a jury trial on all issues he would have been entitled to a jury trial on.

The instant case is identical to Lytle in that the only reason the District Court was able to apply collateral estoppel or res judicata to Petitioner's legal claims was because it had erroneously prevented Petitioner from joining his legal and equitable claims in the first place. There is particular concern in the instant case because Petitioner did in fact initially join every single one of his legal and equitable claims prior to trial of his equitable claims in *Dailey I*.

There has been a gross injustice forced upon Petitioner by this deprivation of his right to a jury trial on all issues common to his equitable and legal claims. There can be no greater violation by a court then the deprivation of a litigant's constitutional rights. Despite the fact that Petitioner has done everything which was required of him, including, meeting the improper administrative prerequisites required by the District

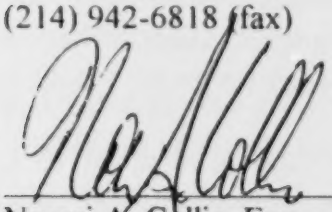
Court, he has been denied his right to a jury trial on every one of his legal claims, including the ADA claim dismissed without prejudice and currently before the Fifth Circuit Court of Appeals.

CONCLUSION

For the reasons stated, Petitioner, Ollie Dailey, prays that this Court grant a Writ of Certiorari to review the decision of the Fifth Circuit Court of Appeals to affirm the District Court's decisions as set out herein.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OLLIE DAILEY,	*	
	*	
Plaintiff,	*	**CIVIL ACTION NO.**
	*	**3:91-CV-1327-X**
LTV AEROSPACE AND	*	
DEFENSE COMPANY,	*	
	*	
Defendant.	*	

ORDER

NOW before the Court ar Plaintiff's Motion to File Plaintiff's Final Supplemental Complaint, filed on June 17, 1993, and the Motion in Support of Defendant LTV Aerospace and Defense Company to Strike Plaintiff's Final Supplemental Complaint and for Attorney's Fees, filed on June 17, 1993. Plaintiff filed his final supplemental complaint without leave of Court on May 28, 1993. Having considered these filed materials and the applicable law, the Court determines that Plaintiff's motion must be **DENIED** but that Defendant's motion to strike must be **GRANTED.**

The facts underlying Plaintiff's final supplemental complaint are remote in time and substance from those informing his complaint and have never been submitted to the EEOC for investigation, which is a prerequisite for his filing suit. Plaintiff's final supplemental complaint, filed on May 28, 1993, is therefore hereby **STRUCK**. Defendant's motion for attorney fees is hereby **DENIED**.

SO ORDERED.

November 4th, 1993.

/s Joe Kendall
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OLLIE DAILEY,	*	
	*	
Plaintiff,	*	**CIVIL ACTION NO.**
	*	**3:91-CV-1327-X**
LTV AEROSPACE AND	*	
DEFENSE COMPANY,	*	
	*	
Defendant.	*	

MEMORANDUM OPINION & ORDER

NOW before the Court are the Motion of Defendant LTV Aerospace and Defense Company for Summary Judgment, filed on July 30, 1993, the response to that motion and the reply to that response. Having considered these filed materials, the summary judgment evidence and the applicable law, the Court determines that Defendant's motion should be, and hereby is, **GRANTED** in part and **DENIED** in part.

This is an employment discrimination case. Plaintiff, an African-American, formerly worked for Defendant as a class B machinist, having been hired in 1984. He was injured on the job in January, 1990, and his doctor placed him on various work restrictions concerning the amount of weight he could lift. These restrictions varied frequently, hitting virtually every five-pound increment between five and fifty pounds. Plaintiff's doctor stated on various occassions that Plaintiff would be unable to work at all. Plaintiff was also transferred back and forth from the first shift to the third shift several times. Defendant contends that these transfers were due to Plaintiff's therapy schedule or otherwise related to his work restrictions while Plaintiff claims that at least one transfer was motivated by racial animus.

Although his physician had recently opined that he would not be able to return to work, Plaintiff filed a complaint with the Office of Federal Contract Compliance Programs (OFCCP) alleging that he was not returned to work because of his handicap. Another incident involved a racist statement of which Plaintiff complained made by a white member of management, Gerald Skinner. After investigation, Defendant determined that Skinner should be suspended for three days for his statement that he believed whites and blacks should not mix. Plaintiff received a three-day suspension for exclaiming "tell those fucking white boys to leave my tool box alone," upon his arrival at work and finding his tool box moved. However, Plaintiff complains that he was suspended in retaliation for complaining about Skinner's statement and that his suspension was racially motivated. Plaintiff also alleges that Defendant denied him training on certain machines because of his race.

Plaintiff alleges several causes of action. He asserts claims for intentional infliction of emotional distress, for a violation of Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 793, for a violation of the Americans with Disabilities Act of 1990, 42 U.S.C. Sec. 12101-12213, and for violations of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e, *et seq.*

The movant in a summary judgment context must show the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *Slaughter v. Southern Talc Co.*, 949 F.2d 17, 170 (5th Cir. 1991). The existence of a genuine issue of material fact is determined based on whether a fair minded jury could return a verdict for the plaintiff based on the evidence presented. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 252 (1986). The rules allocating the burden of proof guide a court in a summary judgment analysis, *Fields v. City of S. Houston*, 922 F.2d 1183, 1187 (5th Cir. 1991), and such allocation depends on the burden of proof that would obtain at trial. *See*

Duplantis v. Shell Offshore, Inc., 948 F.2d 187, 150 (5th Cir. 1991). The nonmovant is not required to respond to the motion until the movant properly supports his motin with competent evidence. *Russ v. International Paper Co.*, 943 F.2d 589, 591 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1675 (1992). However, once the movant has carried his burden of proof, the nonmovant may not sit idly by and wait for trial. *Page v. DeLaune*, 837 F.2d 233, 239 (5th Cir. 1988). When a movant carries his initial burden, the burden shifts to the nonmovant to show that the entry of summary judgment is inappropriate. *Duckett v. City of Cedar park*, 950 F.2d 272, 276 (5th Cir. 1992). Although the nonmovant may satisfy this burden by tendering depositions, affidavits and other competent evidence,[1] "[m]ere conclusory allegations are not competent summary judgment evidence, and they are therefore insufficient to defeat or support a motion for summary judgment." *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992), *cert. denied*, 113 SCt. 82 (1992). Although a court must "review the facts drawing all inferences most favorable to the party opposing the motion," *Rosado v. Deters*, ___ F.3d ___, No. 92-4109, 1993 WL 3939601, at *2 (5th Cir. Oct. 22, 1993)(quoting *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986)), the nonmovant may not rest on mere allegations or denials in its pleadings; instead, "the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). However, merely colorable evidence or evidence not significantly probative will not defeat a properly supported summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). The existence of a mere scintilla of evidence will not suffice. *Id.* at 252. When the nonmoving party fails to make the requisite showing and the moving party has met his summary judgment burden, the movant is entitled to summary

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1 See FED. R. CIV. P. 56(e).

judgment. FED. R. CIV. P. 56(c); *Campbell v. Sonat Offshore Drilling*, 979 F.2d 1115, 1119 (5th Cir. 1992).

This year, the Supreme Court of Texas placed its imprimatur on the intentional infliction cause of action, which had been recognized for some time by courts of appeals. In *Twyman v. Twyman*, 855 s.W.2d 619 (Tex.1993), the court stated the following regarding that cause of action:

> While this court has never expressly recognized the tort of intentional infliction of emotional distress, we found no reversible error in the court of appeals' opinion in *Tidelands Automobile Club v. Walters*, which did so. 699 S.W.2d 939 (Tex. App. -- Beaumont 1985, writ ref'd n.r.e.). There, the court of appeals adopted the elements of the tort as expressed in the RESTATEMENT (SECOND) OF TORTS Sec. 46 (1965). The Restatement elements of intentional infliction of emotional distress are: 1) the defendant acted intentionally or recklessly, 2) the conduct was extreme and outrageous, 3) the actions of the defendant caused the plaintiff emotional distress, and 4) the emotional distress suffered by the plaintiff was severe. Id. According to the Restatement, liability for outrageous conduct should be found "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Id. cmt. d.

Having scrutinized the summary judgment record, the Court concludes that Plaintiff adduces no evidence that Defendant's conduct was extreme or outrageous. Although "Plaintiff contends he can prove a course of conduct intended to harass and harm Plaintiff beginning from the day he was set up and caused to lose his temper at work on the 16th day of October, 1990, [the "fucking white boys" comment] until he was finally laid off on July 31, 1993," he offers no evidence of

such conduct. In the summary judgment context, it is axiomatic that where, as here, the nonmoving party would bear the burden of proof at trial, that party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting FED. R. CIV. P. 56(e)). Plaintiff simply fails that burden.

Plaintiff next asserts a claim under Section 503 of the Rehabilitation Act. That Section provides as follows:

> If any individual with a disability believes any contractor has failed or refused to comply with the provisions of a contract with the United States, relating to employment of individuals with disabilities, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

29 U.S.C. Sec. 793(b). Defendant asserts that no private right of action exists under this provision. *See generally* Marc I. Steinberg & William A. Reece, *The Supreme Court, Implied Rights of Action, and Proxy Regulation*, 54 OHIO ST. L. J. 67 (1993)(regarding the contours of private rights of action). The United States Court of Appeals for the Fifth Circuit agrees with Defendant. *See Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1085 (5th Cir. 1980), *cert. denied*, 449 U.S. 889 (1980)(holding that no private right exists under Section 503). After forcing Defendant to answer this allegation and necessitating a portion of a summary judgment motion to assail it, Plaintiff simply gives up, stating, "Plaintiff will concede he has no individual claim under this statute." The Court wonders why Plaintiff's reasonable inquiry under Rule 11, FED. R. CIV. P., did not reveal the absence of a private right under Section 503

before Plaintiff composed his complaint to include that count and forced Defendant through the time, effort and expense to fight it. In any event, Defendant demonstrates its entitlement to summary judgment on Plaintiff's Rehabilitation Act claim.

Plaintiff's ADA claim stands in an interesting posture. Before passage of the ADA, aggrieved disabled persons had a remedy only though the Department of Labor via the Rehabilitation Act. After passage of the ADA, an additional avenue for recourse opened via private rights of action established by the ADA. Congress realizes, though, that the same conduct might be actionable under both acts, and provided for reduction of duplication of effort by adding the following to the Rehabiliation Act:

> The Secretary shall develop procedures to ensure that administrative complaints filed under this section [Section 503] and under the Americans with Disabilities Act of 1990 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this section and the Americans with Disabilities Act of 1990.

29 U.S.C. Sec. 793(e). The ADA contains a similar provision. *See* 42 U.S.C. Sec. 12117(b) One of the regulations promulgated to avoid duplication states as follows:

> If an individual who has already filed a section 503 complaint with OFCCP subsequently attempts to file or files an ADA charge with EEOC covering the same facts and issues, EEOC will decline to accept the charge (or, alternatively, dimiss the charge that has been filed) on the grounds that such charge has already been filed under the ADA, simultaneous with the filing of the earlier section 503 complaint, and will be processed by OFCCP in accordance with the provisions of this section.

29 C.F.R. Sec. 1641.5(g). Title 41, concerning public contracts and property management, contains the same provision. *See* 41 C.F.R. Sec. 60-742.5(g).

Plaintiff filed a complaint with the OFCCP on November 12, 1992, alleging disability dicrimination, a charge arising under both Section 503 and the ADA. On November 20, 1992, he filed a separate ADA charge with the EEOC, challenging the same action as in the OFCCP complaint. Plaintiff apparently did not inform the EEOC that he had already filed the OFCCP complaint, and the EEOC therefore did not decline to accept the charge or dismiss it, but instead issued a right to sue letter. Plaintiff concedes that if the OFCCP complaint is settled, his ADA claim will be moot as a result. He contends that the flaw in Defendant's reasoning is Defendant's contention that the OFCCP complaint may be settled.

It appears that Plaintiff has managed to create just the sort of confusion and duplication of effort that Congress attempted so copiously to prevent by delegating authority to the administering agencies to harmonize potential duplication between the Rehabilitation Act and the ADA. Because the EEOC, had it known of Plaintiff's earlier OFCCP complaint, would have declined Plaintiff's ADA complaint, it would not have issued a right to sue notice. Rather than add to the confusion that Plaintiff has created, the Court determines that the better course of action would be to allow the administrative process to operate the way Congress intended, and dismiss Plaintiff's ADA claim. As both parties agree, if the OFCCP process is successful, the ADA claim is moot, if not, it will be referred to the EEOC for conciliation, and Plaintiff may then pursue it as he likes.

Finally, the Court turns to Plaintiff's Title VII claim. The legal standards applicable to discrimination cases contain a dance among shifting burdens of production. First, a plaintiff must establish a *prima facie* case, which gives rise to an inference of discrimination. Generally, a

plaintiff does so by proving that he was (1) discharged, (2) qualified for the position, (3) within a protected group at the time of the discharge and (4) replaced by someone outside of the protected group or otherwise discharged because of his membership in the protected group. *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 815 (5th Cir. 1993), *petition for cert. filed*, 60 U.S.L.W. (U.S. Aug. 23, 1993)(No. 93-278). These are the so-called "McDonnell Douglas" factors, after *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and they may be modified as necessary to conform to the facts of a particular case. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 (1976). Accordingly, courts have applied the factors to a variety of employment-related scenarios. *See, e.g., Barnes v. Exxon Corp.*, 57 Fair Empl. Prac. Cas. (BNA) 1384 (S.D. Tex. 1991)(transfer); *Redd v. Phenix City*, 934 F.2d 1211 (11th Cir. 1991)(promotion); *Budd v. City Univ. of New York*, 749 F.Supp. 86 (S.D.N.Y. 1990)(compensation).

By establishing a *prima facie* case, the plaintiff creates a rebuttable presumption that the employer unlawfully discriminated against him. *Saint Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2747 (1993). Next, the burden falls on the defendant to rebut the presumption by producing evidence that the adverse employment actions were taken for a legitimate, nondiscriminatory reason. *Id.* As the Supreme Court has emphasized, although the burden of production shifts to the defendant, the burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. *Id.* The defendant's successfully carrying the burden of production rebuts the *prima facie* case, which at that point drops from the case.[2] *Id.* The plaintiff then has

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[2] It is important to note that whether a defendant carries his burden of production involves no credibility assessment, "[f]or the burden of production determination necessarily *precedes* the credibility-

the opportunity to put on evidence that the defendant's proffered reason was not the true one for the employment decision, but in order to show pretext, the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason. *Id.* at 2752 (emphasis in original).

Plaintiff asserts several different instances of alleged discriminatory conduct. Specifically, he claims that Defendant failed to train him on new machines, moved him to a different shift, and failed to return him to work, all because of his race. He also alleges that his discipline for the "fucking white boys" statement was meted out discriminatorily. Having reviewed the record in light of the standards set forth above and ni the summary judgment context, the Court concludes that genuine issues of material fact exist precluding the entry of summary judgment on Plaintiff's Title VII claims. Defendant's motion must therefore be denied on that count.

For the foregoing reasons, the Court determines that Defendant has demonstrated its entitlement to summary judgment on Plaintiff's intentional infliction and Section 503 Rehabilitation Act claim. Plaintiff's ADA cause of action is dismissed, and Defendant's motion is denied regarding Plaintiff's Title VII claims.

SO ORDERED.

November 9th, 1993

/s Joe Kendall
United States District Judge

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assessment stage." *Saint Mary's Honor Center*, 113 S.Ct. at 2748 (emphasis in original). In other words, the Court is to take the defendant's rebuttal evidence as true. *Id.*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OLLIE DAILEY,	*	
	*	
Plaintiff,	*	**CIVIL ACTION NO.**
	*	**3:91-CV-1327-X**
LTV AEROSPACE AND	*	
DEFENSE COMPANY,	*	
	*	
Defendant.	*	

MEMORANDUM OPINION AND ORDER

NOW before the Court is Plaintiff's Second Motion for Leave to File Plaintiff's Final Supplemental Complaint, filed on December 6, 1993. The Court determines that Plaintiff's motion should be, and hereby is, **DENIED.**

As Plaintiff notes, he filed his final supplemental complaint without leave of court on May 28, 1993. This complaint, and the proposed one concerned in the current motion, sought to add a new issue regarding whether his layoff at LTV, which apparently became effective on July 31, 1993, was an additional act of discrimination or retaliation. Plaintiff filed a motion for leave to file the already-filed supplemental complaint on June 17, 1993. This Court, in considering that motion, determined that the facts underlying it were remote in time and substance from those underlying Plaintiff's current allegations and concluded that it was necessary for the new issue to be submitted to the EEOC; the Court therefore denied Plaintiff's motion. About November 26, 1993, Plaintiff received his right to sue letter from the EEOC on Plaintiff's layoff claim.

This case is set for trial in January, 1994--next month--and is scheduled for a pretrial conference in but a few days, on the 17th of December, 1993. The time for discovery has long since run, and virtually all other deadlines in the Court's scheduling order have likewise run. Simply put, this case is virtually trial ready. To allow Plaintiff to interject yet another issue into the case at this late date would undermine the current trial setting and cause the entire case to be opened anew. In essence, it would necessitate a new, full scheduling order and a new trial setting; indeed, it would be like filing a new case. Because of the inevitable outcome, the Court determines that if Plaintiff's additional allegations are to be adjudicated, they must be the subject of another proceeding; they have come simply too late to be dealt with here.

SO ORDERED.

December 14th, 1993.

/s Joe Kendall
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OLLIE DAILEY,	*	
	*	
Plaintiff,	*	**CIVIL ACTION NO.**
	*	**3:91-CV-1327-X**
LTV AEROSPACE AND	*	
DEFENSE COMPANY,	*	
	*	
Defendant.	*	

MEMORANDUM OPINION AND ORDER

NOW before the Court are the Motion of Defendant LTV Aerospace and Defense Company to Remove Case from Jury Docket, filed on November 12, 1993, and the response to that motion. Having considered these filed materials and the applicable law, the Court determines that Defendant's motion should be, and hereby is, **GRANTED.**

This is a Title VII race discrimination case. The facts supporting Plaintiff's EEOC charge for racial discrimination, which in turn supports his lawsuit, all occurred before the applicable date for the Civil Rights Act of 1991, although Plaintiff pleads some facts arising after the '91 Act's effective date. There latter facts, though, are the subject of another EEOC complaint not at issue here. In the instant motion, Defendant argues that Plaintiff is not entitled to a jury because no EEOC charge supports his post '91 Act facts. Plaintiff argues that those facts were part of a continuing violation and should therefore relate back to his EEOC charge.

The continuing violation doctrine becomes important in relation to conduct occurring outside of a limitation period. The Fifth Circuit has explained this situation thus:

> For a narrow range of cases, those in which a violation is continuing in nature, this court recognizes that liability may be based on continuing unlawful conduct which proceeds the liability period. When an employer has a discriminatory promotion policy or system and the *system* is maintained into the charge-filing period, a plaintiff may attack the promotion system even though the plaintiff was not denied a job benefit within the charge-filing period.

Rendon v. A T & T Technologies, 883 F.2d 388, 395-96 (5th Cir. 1989)(citations omitted)(emphasis in original). This doctrine, though perhaps facially connected to Plaintiff's situation, fails to apply on further interrogation. The facts giving rise to Plaintiff's *race* discrimination claims supported by an EEOC charge all occurred before the '91 Act's effective date. The conduct occurring in October of 1992 gave rise to a separate EEOC complaint that Plaintiff filed, but it dealt now with race discrimination, but rather with disability discrimination under the ADA. Now Plaintiff seeks to assert that race was a motivating factor in October of 1992 although he did not make that allegation before the EEOC. He argues that the earlier filed EEOC charge should also encompass the later occurring conduct.

This will not do. As Defendant demonstrates, if race discrimination occurred in October of 1992, Plaintiff had 300 days to file a charge with the EEOC. *Hornsby v. Conoco, Inc.*, 777 F.2d 243 (5thCir. 1985). Over a year has passed since the alleged October race discrimination. If Plaintiff believed that race motivated some adverse employment action against him in October of 1992, he should have timely amended his charge. Plaintiff simply cannot wedge a new claim into this suit in derogation of procedures that Congress established for the disposition of such claims.

For the foregoing reasons, Defendant's motion must be granted. Although Plaintiff, by October of 1992, was well versed in filing both grievances and EEOC charges based on

race discrimination, he elected to base his charge arising from incidents in October of 1992 on disability discrimination. For him to allege race discrimination now is incongruous, except for the ulterior motive of trying to bootstrap his way into a jury to which he is not otherwise entitled.

SO ORDERED.

December 17th, 1993.

/s Joe Kendall
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OLLIE DAILEY,	*	
	*	
Plaintiff,	*	**CIVIL ACTION NO.**
	*	**3:91-CV-1327-X**
LTV AEROSPACE AND	*	
DEFENSE COMPANY,	*	
	*	
Defendant.	*	

MEMORANDUM OPINION & ORDER

NOW before the Court are Plaintiff's Motion for Reconsideration of November 9, 1993, Memorandum Opinion, filed on November 16, 1993 and the response to that motion. Having considered these filed materials and the applicable law, the Court determines that Plaintiff's motion should be, and hereby is, **DENIED.**

Plaintiff seeks reconsideration of two points in the Court's November 9, 1993 memorandum opinion and order. First he complains regarding the disposition of his intentional infliction of emotional distress claim and second, of the fate of his ADA claim.

Regarding the intentional infliction claim, Plaintiff claims that Defendant deliberately "set him up" to lose his temper and utter a racial slur, thereby enabling Defendant to pounce on him, punishing him for the comment. In Plaintiff's view, the punishment wa not legitimate but was instead retaliation for another incident. Specifically, a white manager stated that he believed whites and blacks should not mix. Plaintiff reported this statement, and the white manager received a suspension for it. Later, Plaintiff came to work and found his tool box relocated to a place Plaintiff was unaccustomed

to its being. Upon finding his moved tool box, Plaintiff stated something like "tell those fucking white boys to leave my tool box alone." Plaintiff was punished with a suspension for his comment.

Plaintiff's motion paints him as a champion of his co-workers' rights, fighting and filing grievances for those rights whle employed by Defendant. He sees Defendant's refusal to return him to work arising not as a result of his lifting restrictions--Defendant claims that it had no work for which he was qualified that would accommodate a lifting restriction--but rather in retaliation for his fighting for co-workers', and his own, "rights."

The Court has absolutely no quarrel with Plaintiff's being a champion of co-workers' rights. The rub lies instead with the amount and quality of evidence that Plaintiff adduced in relation to his intentional infliction claim to rebut Defendant's summary judgment motion. He claims that the "cumulative effect" of Defendant's refusing to return him to work, his suspension for the fucking-white-boys comment, and other "specific instances of discrimination and retaliation," which remain unnamed and, more importantly in this context, unsupported by any evidence, amounts to outrageous conduct sufficient to raise a genuine issue of material fact precluding the entry of summary judgment on his intentional infliction claim.

Conduct supporting an intentional infliction claim must be "utterly intolerable in a civilized community," and "exceed all possible bounds of decency." *Wornick Co. v. Casas*, 856 S.W.2d 732, 735 (Tex. 1993). The Supreme Court of Texas has also stated that "'[i]t is for the court to determine, in the first instance, whether the defendant's condut may reasonably be regarded as so extreme and outrageous as to permit discovery. . . '" *Id.* at 734 (quoting RESTATEMENT (SECOND) OF TORTS Sec. 46 cmt. h.). The best Plaintiff can do to support his allegation of outrageous conduct is to recite the facts surrounding the

fucking-white-boys incident. that and the "cumulative effect" of Defendant's refusal to return him to work constitute the totality of Plaintiff's evidence. An ancillary problem with Plaintiff's argument is that he has no evidence connecting Defendant with the relocating of his tool box. In any event, as a matter of law, what Plaintiff does allege does not raise a genuine issue of material fact on the issue of outrageous conduct. This is not a pleading problem--this is not the 12(b)(6) arena--this is an evidentiary problem; plaintiff simply does not carry his burden.

Plaintiff next takes issue with the Court's dismissal of his ADA claim. It is important to note that the Court dismissed the ADA claim without prejudice because it was still in the administrative process and therefore subject to disposition there. Although the Department of Labor may have deferred its efforts so that the issue could be considered in this suit, the EEOC has apparently decided to undertake conciliaton of Plaintiff's ADA claim. (*See* Aff. Maureen F. Moore at paras. 2-4). Plaintiff has repeatedly complained that that claim will not settle in the administrative process--so much for good faith efforts at settlement as required by Local Rule 9.1(a) and required good faith participation in the administrative process, *see Munoz v. Aldridge*, 894 F.2d 1489, 1492 (5th Cir. 1990)-- but in any event, his fear is unfounded. As Defendant points out, if an employer does not agree to provide the relief determined to be full relief by the EEOC, it is subject to suit either by the EEOC or by the charging party. *See* 42 U.S.C. Sec. 2000e-5(f). If, though, the employee refuses to accept the relief deemed to be full relief by the EEOC, the employee has no further claim against the employer and a subsequent court action will be dismissed. *See Wrenv. Secretary, Dept. of Veterans Affairs*, 918 F.2d 1073, 1077-79 (2nd Cir. 1990), *cert. denied*, 499 U.S. 977 (1991).

In addition to Plaintiff's ADA claim being premature here because it is still involved in the administrative process,

it is far too late to inject what is essentially a new claim into a suit that was filed in 1991 and that is set for trial in less than a month.

For the foregoing reasons, Plaintiff's motion to reconsider is denied.

SO ORDERED.

December 17th, 1993.

/s Joe Kendall
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OLLIE DAILEY,	*	
	*	
Plaintiff,	*	**CIVIL ACTION NO.**
	*	**3:91-CV-1327-X**
LTV AEROSPACE AND	*	
DEFENSE COMPANY,	*	
	*	
Defendant.	*	

FINAL JUDGMENT

By separate Findings of Fact and Conclusions of Law filed today, the Court has found in favor of this Defendant on all Plaintiff's causes of action. Plaintiff's suit is hereby **DISMISSED** in its entirety, with prejudice. Defendant is awareded all costs incurred herein.

SO ORDERED, this 6th day of January, 1995.

/s Joe Kendall
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OLLIE DAILEY,	*	
	*	
Plaintiff,	*	**CIVIL ACTION NO.**
	*	**3:94-CV-325-X**
VOUGHT AIRCRAFT	*	
COMPANY,	*	
	*	
Defendant.	*	

ORDER

Plaintiff, Ollie Dailey, has three suits pending before this Court al of which involve substantially the same claims and allegations. In all of these actions, Dailey alleges that he has been the victim of employment discrimination of one type or another at the hands of the Defendant, its employees, his supervisors and his co-workers. Cause number 91-1327, "*Dailey I*", was litigated in a five-day bench trial and had been taken under advisement by this Court and by separate order with findings of fact and conclusions of law is ruled upon and disposed of this date. Cause number 94-325, "*Dailey II*", was transferred to this Court after it was assigned to Judge A. Joe Fish. Cause number 94-1214, "*Dailey III*", was transferred to this Court after it was assigned to Judge Barefoot Sanders.

Dailey II alleges that Dailey was laid off on account of his race and in retaliation for previously alleging Title VII violations. There is no factual or evidentiary support for Dailey's claim that he was laid off either in retaliation for having filed previous discrimination claims, or that he was laid off on account of his race, which is different from evidence submitted in *Dailey I*.

Upon review of the complaint in *Dailey II* and the amended complaint in *Dailey I*, the Court is of the considered opinion that the Plaintiff and his counsel have filed *Dailey II* in an attempt to relitigate the matters which were tried and fully litigated and have been under advisement and consideration by this Court. But for the tranfer policies of this Court, considerable judicial effort and resources would have been expended by Judges Fish and Sanders in dealing with these vexatious, duplicative lawsuits. Such an expenditure *was made* by Judge Kendall and Counsel for the Defendants in dealing with these cases. If this Court were to allow Plaintiff and his counsel to succeed in their attempt to obtain a second bite at the apple simply by inviting themselves to someone else's picnic, it would be allowing them to make a joke out of the legal process. By separate order of this date, the Defendant's motion for sanctions has been granted for this conduct.

Therefore, after consideration of the documents in both cases, the Court is of the opinion that the instant action should be, and hereby is, **DISMISSED** with **PREJUDICE**. The Clerk of the Court is **ORDERED** to close this case and to provide all parties with notice of its dismissal.

SO ORDERED.

Dated: January 6th, 1995.

/s Joe Kendall
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OLLIE DAILEY,	*	
	*	
Plaintiff,	*	**CIVIL ACTION NO.**
	*	**3:94-CV-1214-X**
VOUGHT AIRCRAFT	*	
COMPANY,	*	
	*	
Defendant.	*	

MEMORANDUM OPINION AND ORDER

Plaintiff, Ollie Dailey, has three suits pending before this Court all of which involve substantially the same claims and allegations. In all of these actions, Dailey alleges that he has been the victim of employment discrimination of one type or another at the hands of the Defendant, its employees, his supervisors and his coworkers. Cause number 91-1327, "*Dailey I*", was litigated in a five-day bench trial and had been taken under advisement by this Court and by separate order with findings of fact and conclusions of law is ruled upon and disposed of this date. Cause number 94-325, "*Dailey II*", was transferred to this Court after it was assigned to Judge A. Joe Fish. Cause number 94-1214, "*Dailey III*", was transferred to this Court after it was assigned to Judge Barefoot Sanders.

Dailey III alleges that Dailey was not permitted to return to work in October of 1992 in violation of the ADA, Title VII and 42 U.S.C. Sec. 1981. The Court finds that with the exception of the ADA action, the causes of action alleged are duplicative of claims which were asserted or should have been asserted in *Dailey I*.

The Title VII claim was ruled by this Court in its opinion in *Dailey I* issued on December 17, 1993 dismissing that claim for failure to file a new charge of discrimination within 300 days from the October 1992 events about which Dailey complains, and is barred by the doctrine of collateral estoppel. "Collateral estoppel precludes relitigation of issues actually litigated and determined in [a] previous suit." *Montana v. United States*, 99 S.Ct. 970, 973 (1979). The issues involved in the Title VII claim were clearly "actually litigated and determined" by a previous order.

Dailey's claim arising under 42 U.S.C. Sec. 1981 is barred by the doctrine of res judicata as it should have been asserted in *Dailey I*. True "res judicata," or claim preclusion, requires, "among other things, an identity of cause of action or claims . . . [A] single cause of action or claim cannot be 'split' by advancing one part in an initial suit and attempting to reserve another for a later suit." *Texas Employer's Ins. Ass'n v. Jackson*, 862 F.2d 491, 501 (5th Cir. 1988). Ms. Collie and the Plaintiff have attempted to split Dailey's single cause of action of employment discrimination by withholding the Sec. 1981 claim like a card up their sleeves. The Fifth Circuit has generally applied a broad definition of "claim" or "cause of action" in determining whether or not a prior court judgment bars a later suit. *See Texas Employer's Ins. Ass'n v. Jackson*, 862 F.2d 491, 501 (5th Cir. 1988). Even a narrowly tailored definition would prevent the thinly-veiled attempts of Lawyer Collie and Mr. Dailey.

Upon review of the complaint in this action and the amended complaint of *Dailey I*, the Court is of the considered opinion that the Plaintiff and his counsel have filed *Dailey III* in an attempt to relitigate the matters which were tried and fully litigated and have been under advisement and consideration by this Court. But for the transfer policies of this Court, considerable judicial effort and resources would have been expended by Judges Fish

and Sanders in dealing with these vexatious, duplicative lawsuits. Such an expenditure *was made* by Judge Kendall and Counsel for Defendants in dealing with these cases. If this Court wer to allow Plaintiff and his counsel to succeed in their attempt to obtain a second bite at the apple simply by inviting themselves to someone else's picnic, it would be allowing them to make a joke out of the legal process. By separate order of this date, the Defendant's motion for sanctions has been granted for this conduct.

Therefore, after consideration of the documents in both cases, the Court is of the opinion that the Title VII claim and the claim under 42 U.S.C. Sec. 1981 in the instant action shoud be, and hereby are **DISMISSED** with **PREJUDICE.**

SO ORDERED.

Dated: January 6, 1995.

/s Joe Kendall
United State District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OLLIE DAILEY,	*	
	*	
Plaintiff,	*	**CIVIL ACTION NO.**
	*	**3:94-CV-325-X**
VOUGHT AIRCRAFT	*	
COMPANY,	*	
	*	
Defendant.	*	

OLLIE DAILEY,	*	
	*	
Plaintiff,	*	**CIVIL ACTION NO.**
	*	**3:94-CV-1214-X**
VOUGHT AIRCRAFT	*	
COMPANY,	*	
	*	
Defendant.	*	

ORDER ON MOTION OF DEFENDANT VOUGHT AIRCRAFT COMPANY FOR RULE 11 SANCTIONS

Now before the Court is Defendant's Motion for Rule 11 Sanctions. After considering the written positions of the parties, the Court is of the opinion that the position of Vought Aircraft Company is well taken and that the motion should be, and hereby is, **GRANTED**. In support of this Order, the Court makes the following findings:

Plaintiff Ollie Dailey ("Dailey") has filed three separate actions against Vought Aircraft Company ("Vought"), all of which are pending before this Court. 3:91-CV-1327-X

("*Dailey I*"), was tried before the Court in January of 1994, concerned race discrimination and retaliation in violation of Title VII and has been under advisement and consideration. The Court in a separate order disposed of that case today. The second action, 3:94-CV-325-X ("*Dailey II*") alleges Dailey was laid off on account of his race and in retaliation for previously alleging Title VII violations. This is the same claim litigated in *Dailey I*. The third action, 3:94-CV-1214-X ("*DaileyIII*") alleges that Dailey was not permitted to return to work in October of 1992 in violation of the ADA, Title VII and 42 U.S.C. Sec. 1981. Unhappy with the Court's speed in ruling[3], and obviously unfamiliar with the transfer rules of this Court as applied to similar cases involving the same litigants,[4] Counsel and the Plaintiff simply filed the same lawsuit again. The Court finds that with the exception of the ADA claim, Dailey and his counsel violated Rule 11 in bringing these suits, alleging Title VII and Sec. 1981 were violated when he was not returned to work in October of 1992, matters which were specifically and thoroughly litigated before this Court in January 1994, in *Dailey I* (3:91-CV-1327-X).

There is no factual or evidentiary support for Dailey's claim that he was laid off either in retaliation for having filed previous discrimination claims, or that he was laid off on account of his race, which is different from any evidence submitted in those claims in *Dailey I*. Neither Dailey nor his

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3 By correspondence to the Court and by repeated telephone calls to the Court, both Counsel and Mr. Dailey expressed their anger with the Court's delay in ruling and threatened in writing to mandamus the Court if the Court did not "rule quickly."

4 *Dailey II* and *Dailey III* were originally assigned by random draw to Judges A. Joe Fish and Barefoot Sanders, respectively, and were transferred to Judge Kendall after the existence of *Dailey I* was determined.

counsel conducted a reasonable inquiry into the facts at any time prior to the filing of these actions, and in fact knew the facts were otherwise. Dailey and his counsel may not sing one tume in front of this Court and then later attempt to sing the same song to other judges hoping at least one will march to the beat. Dailey and his counsel have therefore violated Rule 11 (b), (b)(1) and (b)(3).

The Title VII claim found in *Dailey III* was ruled on by this Court in its opinion of December 17, 1993 dismissing that claim. Therefore that claim is barred by the doctrine of collateral estoppel, a fact known to counsel for the Plaintiff. Dailey's claim arising under 42 U.S.C. Sec. 1981 is barred by the doctrine of res judicata. Ms. Collie has taken the time-worn approach of flinging things against the wall to see what sticks to a new high. There is no basis for arguing that these claims are warranted under existing law or that there is any basis for arguing for an extension, modification or reversal of existing law. Neither is there a cogent argument for the establishment of new law. Dailey and his counsel have therefore violated Rule 11(b)(1) and Rule 11(b)(2).

The Court concludes that the new suits were filed hoping either to circumvent the perceived outcome of the case we tried in the January 1994 bench trial or they were filed to harass the defendants in the hopes of extorting a nuisance value settlement. Regardless, the Court must deter repetition of such conduct by these litigants or comparable conduct by others similarly situated therefore, appropriate sanctions are necessary. The Court finds that Dailey and his counsel should be held jointly and severally liable for the costs and attonerys' fees Vought has incurred in defending these actions. Accordingly, the Court.

ORDERS, that Vought provide the Court and opposing counsel a statement of costs and attorneys' fees incurred in defending action nos. 3:94-CV-325-X and 3:94-CV-1214-X, exclusive of the ADA claim, within ten days of entry of

this Order. Plaintiff and his counsel shall have ten days within which to dispute any of the charges and fees. Within twenty days after resolution by the Court of any disputes raised by the Plaintiff or his counsel, the Court

FURTHER ORDERS, that Plaintiff Ollie Dailey and his counsel, Noemi Collie shall pay to Vought Aircraft Company and True Rohde & Sewell the amount approved by this Court as reasonable costs and fees.

After careful consideration, the Court believes this to be the least severe sanction available to deter this conduct in the future and to make the aggrieved Defendant whole. Having no knowledge of previous sanctionable conduct by Ms. Collie or the Plaintiff, the Court is not imposing any punitive sanctions, at this time, for the waste of judicial resources that has occurred as a result of the offending conduct, but both are hereby warned that any similar future conduct will be dealt with more harshly.

SO ORDERED.

Dated: January 6th, 1995.

/s Joe Kendall
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OLLIE DAILEY,	*	
	*	
Plaintiff,	*	**CIVIL ACTION NO.**
	*	**3:94-CV-1214-X**
VOUGHT AIRCRAFT	*	
COMPANY,	*	
	*	
Defendant.	*	

JUDGMENT

In accordance with the Court's separate order granting the motion to sever dismissed claims dated April 12, 1995, it is **ORDERED, ADJUDGED AND DECREED** that judgment be entered for the defendant and that Plaintiff's claim that he was denied the right to return to work in October of 1992 in violation of Title VII and 42 U.S.C. Sec. 1981 be **DISMISSED WITH PREJUDICE**.

It is further **ORDERED, ADJUDGED AND DECREED** that judgment be entered for the defendant and that Plaintiff's claims that he was laid off on account of his race and in retaliation for his having previously brought Title VII claims also be **DISMISSED WITH PREJUDICE**.

It is further **ORDERED, ADJUDGED AND DECREED** that costs of court attributable to these claims be assessed against the Plaintiff.

All other claims present in cause number 3:94-CV-1214-X survive this judgment.

SO ORDERED.

Dated: April 12th, 1995.

/s Joe Kendall
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 95-10156 and
95-10437
Summary Calendar

OLLIE DAILEY,

Plaintiff-Appellant,

VS.

LTV AEROSPACE AND DEFENSE COMPANY,

Defendant-Appellee.

****

OLLIE DAILEY,

Plaintiff-Appellant,

VS.

VOUGHT AIRCRAFT COMPANY,

Defendant-Appellee.

Appeals from the United States District Court for the
Northern District of Texas
(3:91-CV-1327-X & 3:94-CV-325)

Before JOLLY, JONES, and STEWART, Circuit Judges.

PER CURIAM:*

Through piecemeal filings with the Equal Employment Opportunity Commission ("EEOC") over a period of several years on some charges, and failure to file with the appropriate administrative agency on others, appellant Ollie Dailey created a legal and procedural morass for the trial court. We find that the district court maneuvered through that morass with precision, and therefore affirm in all respects the judgments and rulings of the district court that are the subject of this appeal.

I.

Since 1990, Dailey has brought three suits against Vought and its predecessor, LTV, for violations of employment-related statutes.

A.

The first, Dailey v. LTV Aerospace & Defense Co., No. 95-10156 ("Dailey I"), alleged Vought discriminated aginst Dailey on account of his race and disability, retaliated against him because he complained of discrimination, and intentionally inflicted emotional distress upon him. Dailey also sought to recover damages pursuant to the Civil Rights Act of 1991 (the '91 Act). In Dailey I, the district court:

> -dismissed Dailey's claims arising under the '91 Act, holding that the discriminatory conduct at issue occurred before passage of the '91 Act (September 7, 1991);
>
> -struck Dailey's final supplemental complaint, filed without leave of court, on the basis that the discrimination claims relating to Dailey's July 1993 layoff (the reason for the supplemental complaint)

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

were too remote in time to the October 1990 actions alleged in the original complaint, and that no EEOC charge had been filed on those claims (November 4, 1993);

-dismissed Dailey's second attempt to file the same supplemental complaint a few days before the pretrial conference (December 14, 1993);

-entered summary judgment in favor of Vought on Dailey's claims for intentional infliction of emotional distress and violation of the Rehabilitation Act (November 9, 1993);

-dismissed Dailey's claims under the ADA, without prejudice, to allow completion of the administrative process (November 9, 1993); denied motion for reconsideration of that dismissal (December 17, 1993);

-removed Dailey's case from the jury docket because Dailey's remaining claims arose before the effective date of the '91 Act, and Dailey had not made a timely attempt to amend his previous charge of race discrimination to include his October 1992 attempt to return to work (December 17, 1993);

-after trial on the merits of Dailey's claims, made findings of fact and conclusions of law dismissed Dailey's remaining claims and entering final judgment for Vought (January 6, 1995).[6]

B.

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6 This Court has jurisdiction to hear Dailey's appeal from this final judgment pursuant to 28 U.S.C. Sec. 1291.

In his second lawsuit, filed on February 18, 1994 ("Dailey II"), Dailey alleged Vought laid him off as a result of race discrimination and retaliation in violation of Title VII. Two months after he filed the second suit, Dailey attempted to amend his complaint to include claims that Vought violated the ADA, Title VII, and 42 U.S.C. Sec. 1981, when it failed to return him to work in October of 1992. Before the district court could rule on this motion to amend, Dailey withdrew it and filed a third action ("Dailey III") asserting his ADA, Title VII and Sec. 1981 claims. Dailey II and Dailey III were subsequently consolidated, and transferred to the same judge who had heard Dailey I.

In January 1995, the district court ruled as follows in the consolidated action (Dailey II and III)[7]: 1) Dailey presented no more evidence of discrimination than he had presented during Dailey I in support of his layoff claims, and his evidence was therefore insufficient to demonstrate discrimination; 2) Daiey and his counsel failed to conduct a reasonable inquiry into the facts before filing Dailey II challenging Dailey's layoff, and sanctions against both Dailey and his counsel were therefore appropriate; 3) Dailey's Title VII claim challenging the defendants' refusal to allow him to return to work in October of 1992 (asserted in Dailey III) had already been disposed of in Dailey I; 4) Dailey's Sec. 1981 claim challenging the defendants' refusal to allow him to return to work in October of 1992 asserted in Dailey III was barred as it could have been asserted in Daildy I; and 5) sanctions under Rule 11 were appropriate against both Dailey and his counsel for filing Daildy III.

In April 1995, the district court granted Dailey's motion to sever and entered final judgment in Dailey II and on the claims in Dailey III alleging Title VII and Sec. 1981

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7 These rulings are the subject of Appeal No. 95-10437, the second of Dailey's two consolidated appeals.

violations. Dailey's remaining ADA claim in Dailey III is currently pending before the district court.[8]

Dailey now appeals, challenging most of the rulings of the district court over the course of the litigation described above. Dailey argues that the district court: 1) should have allowed him to amend his complaint in Dailey I to incude additional Title VII claims, because he either did not need to exhaust his administrative remedies or, if he needed to exhaust his remedies, he had done so; 2) should not have dismissed (without prejudice) his ADA claims from Dailey I; 3) should not have removed Dailey I from the jury docket on the ground that there were no post '91 Act allegations properly before the court; 4) should not have denied Dailey the right to a jury trial in Dailey I; 5) should not have dismissed Dailey's Title VII and Sec. 1981 claims in Dailey II and Dailey III; and 6) should not have imposed sanctions for attempting to bring the claims in Dailey II and III that the district court held were without merit, or barred by res judicata.

We have reviewed the record, records excerpts, rulings of the district court, and briefs of the party. Although this litigation has followed an agonizing (and not yet completed) pathway to reach this appeal, in large part because of the careless pleading of the plaintiff, we find that the district court has committed no reversible error in its rulings. We therefore AFFIRM.

AFFIRMED

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8 Pursuant to Rule 54 of the Federal. Rules of Civil Procedure, Dailey sought and was granted severance and issuance of a final judgment of the dismissal and sanctions orders in the second and third suits. See Order of the District Court of April 12, 1995. This court therefore has jurisdiction over the appeal of those matters pursuant to 28 U.S.C. Sec. 1291.